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No. 80-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE NORTH HAVEN BOARD OF EDUCATION, *Petitioner,*

v.

TERREL H. BELL, *et al., Respondents.*

and

THE TRUMBULL BOARD OF EDUCATION, *Petitioner*

v.

UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents.*

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER OF HILLSDALE COLLEGE

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Hillsdale College, a private, nonsectarian, coeducational college located in Hillsdale, Michigan, moves, pursuant to Rule 36 of this Court's Rules, to file the within brief *amicus curiae* in support of the petitioners, the North Haven and Trumbull Boards of Education. This motion is necessary because the respondent Linda Potz refused to consent to the filing of Hillsdale's brief.

As explained in greater detail in the section of the brief entitled "Interest of Amicus Curiae," Hillsdale is presently involved in litigation in which the validity of the sex discrimination or "Title IX" regulations (34

C.F.R. Part 106 (1980)) is the central issue. Since its founding, Hillsdale has attempted to preserve its independence and autonomy from governmental control by refusing to accept any form of federal or state aid. Under the Title IX regulations, however, Hillsdale is deemed a recipient of federal financial assistance, subject to federal regulatory control in its entire operation, merely because it enrolls students who secure federally financed grants and loans. Hillsdale challenged the assertion of this institution-wide authority by refusing to sign the Assurance of Compliance with the Title IX regulations. Hillsdale believed that Congress passed Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et. seq.* ("Title IX") to bar sex discrimination only in activities and programs receiving federal financial assistance and never intended the Department of Education to have the authority it claimed over Hillsdale which maintains no such activities or programs.

Hillsdale's refusal to sign the Assurance of Compliance has led to an order, which, if not reversed by the Sixth Circuit Court of Appeals, will terminate Hillsdale's students' federally financed loans and grants. If, as seems likely to Hillsdale, this Court resolves the issues presented here by examining the precise meaning of the words "program and activity receiving federal financial assistance" in Title IX then it could simultaneously be speaking to a central issue in the Hillsdale case itself. Hillsdale, therefore, is obliged to address that issue.

Hillsdale will not review the legislative history, judicial authority, and other materials which bear on the question of federal regulatory authority over employment under Title IX which will be discussed by the other parties but will focus instead on the narrower question

of the meaning of the words "program and activity" in Title IX, a question which may not be treated at length by the other parties. Furthermore, Hillsdale believes its brief will assist the Court, for Hillsdale will address this issue from the perspective of a college which believes that there is an abiding, national consensus that the American, private educational system should be protected from the overreaching, excessive, federal regulatory control which the Title IX regulations represent.

RESPECTFULLY SUBMITTED,

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UNITED STATES DEPARTMENT OF EDUCATION AND LINDA POTZ, *Respondents.*

BRIEF *AMICUS CURIAE* OF HILLSDALE COLLEGE IN SUPPORT OF THE PETITIONERS

INTEREST OF AMICUS CURIAE

This case involves the validity of the employment section of the regulations[1] promulgated by the Department of Health, Education and Welfare[2] to

[1] 34 C.F.R. Part 106 (1980). The employment section is subpart E, 34 C.F.R. §§ 106.51-106.61. All references herein to the Code of Federal Regulations are to the 1980 edition.

[2] The Department of Health, Education and Welfare no longer exists and its functions with respect to Title IX have been transferred to the new Department of Education.

effectuate the purposes of Title IX of the Education Amendments of 1972 ("Title IX"), the statute which prohibits sex discrimination in education programs or activities receiving federal financial assistance.[3] Hillsdale College, *amicus curiae*, is presently litigating the validity of the Title IX regulations in a case pending before the Sixth Circuit Court of Appeals.[4]

Since its founding in 1844, Hillsdale College, a private, nonsectarian, coeducational college,[5] has refused to accept any federal or state financial aid fearing that to do so would inevitably subject the College to governmental prescription of education policies, jeopardizing the College's academic independence and autonomy. The College, however, enrolled and continues to enroll students who receive federal financial assistance in the form of federal grants or federally insured loans.

Until 1976, it did not appear that Hillsdale's long standing independence was in imminent danger. Even after review of the legislation ultimately enacted into law as Title IX, Hillsdale, and many colleges similarly situated, saw no application of the statute to them because they maintained no program or activity receiving federal financial assistance and the statute's scope was

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[3] Section 901 of Title IX provides, in pertinent part,:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. . . ." 20 U.S.C. § 1681(a) (1976)

[4] *Hillsdale College* v. *Department of Education*, No. 80-3207 (6th Cir., petition for review of order filed March 25, 1980).

[5] The College, located in Hillsdale, Michigan presently enrolls about 1,000 students.

limited to such programs and activities. The implementing regulations adopted by the Department of Health, Education and Welfare, however, were not limited in their commands to actual programs and activities receiving federal financial assistance, but applied to entire educational institutions and school systems in all their programs, activities and employment practices. Moreover, the regulations defined the words "federal financial assistance" and "recipient"[6] in such a way as to deem colleges, such as Hillsdale, "recipients" of federal financial assistance, subject to all the regulations' requirements, even though they received no direct federal aid but merely admitted students who used federal grants and loans to help pay for the cost of their education.

In order for Hillsdale's students to continue to receive their federal assistance, HEW demanded that Hillsdale execute an Assurance of Compliance with the Title IX regulations. Hillsdale refused to execute this document because it was certain that the Congress which passed Title IX never intended HEW to have the universal regulatory authority over Hillsdale which HEW claimed.

Hillsdale's refusal led to an administrative compliance proceeding which has now resulted[7] in an

[6] *See* 34 C.F.R. §§ 106.2(h) ("recipient"), 106.2(g)(l)(ii) ("Federal financial assistance").

[7] Initially, an administrative law judge denied HEW's request for an order terminating federal financial assistance to Hillsdale students. Acknowledging the existence of many cases in which the courts had held that part of the Title IX regulations relating to the prohibition of sex discrimination in employment invalid because it exceeds the statutory authorization granted to HEW, the administrative law judge ruled that HEW did not have the power to require the execution of the Assurance of Compliance. The Reviewing Authority, Civil Rights, reversed that decision, however.

order terminating federal financial assistance to Hillsdale's students unless Hillsdale executes the Assurance of Compliance. There is, of course, no allegation that the College has ever discriminated against anyone; Hillsdale's refusal to sign the Assurance was the only basis for the HEW enforcement action.

Hillsdale has petitioned the Sixth Circuit Court of Appeals for review of that order, arguing, *inter alia*, that the Title IX regulations are in excess of the statutory authority granted HEW because they are not limited in their coverage, as they should be, to those educational programs and activities which receive federal financial assistance.

The determination of the issue before this Court, whether the Department of Education, HEW's successor, has the regulatory authority over the employment practices of petitioner school boards it claims, may well require this Court's interpretation of the meaning of the words "education program or activity receiving Federal financial assistance" in Section 901 of Title IX and an analysis of the consequences of that interpretation for the regulatory authority the Department of Education claims. Several courts, such as the Fifth and Sixth Circuit Courts of Appeals,[8] have held that the Department of Education does not have the authority over all employment practices of school boards, colleges, or universities because the statute limits

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[8] *Dougherty County School System* v. *Harris*, 622 F. 2d. 735 (5th Cir.), *pet. for cert., filed sub nom. Dougherty County School System v. Bell*, 49 U.S.L.W. 3589 (Dec. 22, 1980); *Romeo Community Schools* v. *HEW*, 600 F. 2d 581 (6th Cir.) *cert. denied*, 444 U.S. 972 (1979); *Seattle University* v. *HEW*, 16 F.E.P. Cases 719 (W.D. Wash. 1978) [CCH], *aff'd per curiam*, 621 F. 2d. 992 (9th Cir.), *cert. granted*, 49 U.S.L.W. 3409 (Dec. 1, 1980).

the Department's authority to those programs or activities within the school system or university which actually receive federal financial assistance. If this court uses the same analysis, its decision could affect the Hillsdale case in a most significant way since Hillsdale's case is based, in large part, upon the contention that the Title IX regulations are invalid because they are not "program specific", *i.e.*, limited in scope to actual education programs or activities receiving federal financial assistance. Hillsdale's interest in this case is, therefore, obvious and justifies, Hillsdale submits, the acceptance of this brief.

SUMMARY OF ARGUMENT

In this brief Hillsdale will establish that: (1) the regulatory authority of the Department of Education under Title IX is limited to those activities and programs within an education institution or school system which receive federal financial assistance under federal grant statutes; (2) restricting the Department of Education's regulatory authority to the actual Congressional command serves the acknowledged national interest in preserving from excessive regulatory control the diversity which private educational systems provide American education and culture.

ARGUMENT

I. The Regulatory Authority Of The Department Of Education Under Title IX Is Limited To Those Activities And Programs Within An Education Institution Or School System Which Receive Federal Financial Assistance Under Federal Grant Statutes.

Section 901 of Title IX of the Education Amendments of 1972, (20 U.S.C. §1681), contains Title IX's basic prohibition against sex discrimination in federally assisted education programs; it provides that no person shall, on the basis of sex,:

- be excluded from participation in any education program or activity receiving federal financial assistance;
- be denied the benefits of any education program or activity receiving federal financial assistance; or,
- be subjected to discrimination under any education program or activity receiving federal financial assistance.

Section 902 of Title IX (20 U.S.C. §1682) authorizes federal agencies, such as the Department of Education, to effectuate Section 901's prohibitions with respect to each such program and activity by issuing rules, regulations, or orders of general applicability. The ultimate sanction for failure to comply with the regulations promulgated is the termination of federal financial assistance but the termination must be limited in its effect to the particular program, or part thereof, in which noncompliance with the regulations has been found.

That the institution-wide scope of the Title IX regulations exceeds the statutory authorization granted by Congress is self evident. Title IX protects those who participate in federally assisted "education program[s] and activit[ies]" from sex discrimination by the educational institution or school board operating those programs. A program funded under a federal assistance statute such as a college-operated program to train bilingual teachers, funded under the Bilingual Education Act[9] or an elementary school's bilingual education program for Hispanic children funded under the same act, would be federally assisted education programs under Title IX. Section 901 of Title IX therefore bars the college or the school from taking any action which would, on the basis of sex, "exclude any person from participation in," or "deny such student the benefits of," or "subject him or her to discrimination under" those federally funded bilingual education programs. At the same time, however, a gym class at the school or the glee club at the college are not within the purview of Title IX. Although the class and the club are "education programs or activities" they are not programs or activities which receive federal financial assistance and the Department of Education has no regulatory authority over them.

Section 902 but confirms what Section 901 already makes explicit: Congress did not intend the Department of Education to have the institution-wide authority it claims but instead provided that its regulations be limited in scope and effect to the actual programs within

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[9] 20 U.S.C. § 3233 (Supp. II 1978).

an institution or school system which are funded by federal grant statutes. It provides:

> "Each Federal department and agency which is empowered to extend Federal financial assistance *to any education program or activity* . . . is authorized and directed to effectuate the provisions of section 1681 of this title [20 U.S.C. §1681] *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. . . ." 20 U.S.C. §1682 (1976) (emphasis added).

Thus, the focus of the regulations to be issued must be with respect to the program or activity to which they relate, *i.e.*, the program or activity within the institution or school board which actually receives the federal financial assistance.

The language of Title IX is so clear and the intention of Congress so obvious that every court, save the Second Circuit in this case, has held that the Title IX regulations, because they are not program specific but purport to cover an entire educational institution or school system are invalid. *Dougherty County School System* v. *Harris*, 622 F.2d at 737; *Romeo Community Schools* v. *HEW*, 600 F.2d at 584; *Seattle University* v. *HEW*, 16 F.E.P. Cases at 720-21; *Cf. Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969) (construing the words "program and activity" in Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d (1976)).

To all of this the Second Circuit, in this case, gave no real answer. To the school board's assertion that the employment section of the Title IX regulations were

invalid because they were not "program specific", an assertion accepted by every other court to whom it had been addressed the Second Circuit could only say:

> "[W]e think the statute [Title IX] merely requires that any termination of funds be limited to the particular program or programs in which noncompliance with §901 is found and does not require HEW to specify prior to termination which particular programs receiving financial assistance are covered by its regulations." *North Haven Board of Education* v. *Hufstedler,* 629 F. 2d. 773, 785 (2nd Cir. 1980).

This statement is incorrect as is the Court's previous statement, that "[n]othing in §902 [20 U.S.C. §1682] requires HEW only to issue regulations directed at specific programs." *Id.* Section 902 certainly does; it requires that HEW issue Title IX regulations *with respect* to the education programs and activities to which it extended federal financial assistance. Furthermore, the same section requires that any termination of that assistance be limited, in effect, to the particular program in which noncompliance with the regulations is found. Although the Second Circuit claimed that the proper scope of the termination power was not before it,[10] in fact, it will be impossible to obey this statutory requirement if the Department of Education is found to have the institution-wide authority it claims. For example, if the teacher in the *Trumbull* case is found to have a legitimate complaint, the Department of Education will, if the Second Circuit's decision is permitted to stand, terminate aid to the school board even though the failure to comply with Title IX regulations will not have occurred in a program or activity receiving federal financial assistance and the

[10] *Id.* at 785-86.

termination will not be limited to any particular, federally financed program in which the noncompliance with the regulations occurred. Testing the scope of the Department of Education's regulatory authority by examining the consequences of the remedy it will impose establishes, in one more way, that the only proper scope of that regulatory authority is as to programs and activities within an educational institution or school system which actually receive federal financial assistance under specific, federal grant statutes.

II. Restricting The Department Of Education's Regulatory Authority Serves The Interest Of Preserving The Diversity Which Private Education Provides To American Education.

There is a broad, governmental consensus that private education systems, particularly at the college level, provide a stimulating diversity and balance to what would otherwise be an exclusively state-run system and that the preservation of that diversity is in the national interest. Congress has specifically so stated[11] and the Executive branch has shared its view. For example, Joseph Califano, when Secretary of HEW, stated of private colleges and universities:

> "They have been guardians of independent thinking and academic freedom, enjoying a bit more insulation from the whims and pressures of politics than their tax-supported sisters.
>
> Perhaps the greatest contribution of these private institutions, beyond training talent for the nation, has been diversity; the rich variety that colleges like this lend to the American educational landscape.

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[11] *See, e.g.*, 117 Cong. Rec. 39249 (remarks by Rep. Erlenborn, Nov. 4, 1971); H.R. No. 92-554, 92d Cong., 1st Sess. (1971), reprinted in [1972] U.S. Code Cong. & Ad. News 2462, 2590.

> What an incredibly rich resource: Hundreds of institutions, each independent; each solving its problems in its own way; each a vital center of innovation and experiment; each with its own special commitment to cultural and moral values.
>
> It is this diversity that gives American higher education and American life so much of their vitality. It is this diversity that your national government is pledged to nourish and safeguard." 123 Cong. Rec. E3798 (Daily ed. June 15, 1977).

Similarly, this Court has acknowledged that freedom of the "entire university community" is entitled to first amendment constitutional protection, and has struck down governmental attempts to prohibit private education[12] and to interfere unnecessarily with the autonomy and independence of private schools.[13] Despite this consensus, governmental regulation of private, university education has grown so pervasive and particular that private university presidents have warned that the diversity represented by their institutions will soon disappear as all universities are increasingly compelled to conform to a pristine, federal model or archetype.[14]

[12] *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925).

[13] *Farrington* v. *Tokushige*, 273 U.S. 284 (1927); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

[14] *See, e.g.*, the statements of Kingman Brewster, then President of Yale University, and of Dallin Oaks, then President of Brigham Young University, in Hearings on Sex Discrimination Regulations Before the Subcommittee on Post Secondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. at 231-37 (Oaks) and at 234 (Brewster), and the statement of John R. Hubbard, President of the University of Southern California, quoted in Oaks, *A Private University Looks at Government Regulation*, 4 J. of Coll. and U. Law 4, 8 (1976). *See also*, G. Roche, *The Balancing Act* (1974). The author, Dr. George C. Roche, III, is the President of Hillsdale College.

The Title IX regulations show how justified that concern is. In a manner unprecedented in the federal regulation of university education, the federal government regulates a university's education of a student from the moment the student considers attending that university until his or her graduation.

The regulations specify at which high schools the university may recruit students for admission,[15] the literature it may provide that student concerning itself,[16] and the tests which the university may require the student to take as a condition of admission.[17] If the student passes the test for admission but needs financial assistance, the regulations specify how the university may use *its own funds* to aid the student[18] even though the funds may come from an entirely private source, such as a bequest to the university to endow a scholarship.

Once the student is admitted, the regulations specify the courses the student may take,[19] the manner in which the student is housed, whether on or off campus,[20] the health services provided the student,[21] and his or her participation in extracurricular activities[22] and sports.[23]

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[15] 34 C.F.R. § 106.23 (b).

[16] 34 C.F.R. § 106.9.

[17] 34 C.F.R. § 106.21(2).

[18] 34 C.F.R. § 106.37.

[19] 34 C.F.R. § 106.34.

[20] 34 C.F.R. § 106.32.

[21] 34 C.F.R. § 106.39.

[22] 34 C.F.R. § 106.31(a). One regulation speaks to the composition of the college's Glee Club (§ 106.34 (f)).

[23] 34 C.F.R. § 106.41.

They would control the hours at which the students must return to their dormitories, and the hours during which the male students may visit the females and vice versa[24] if, before the regulations, such hours had been different for men and women. Finally, they control the manner in which the university may treat the consequences of its students' marriages, pregnancies, and abortions.[25]

This regulatory excess reaches its apotheosis in the Hillsdale case. Hillsdale, which *refuses* federal aid to preserve its independence nevertheless is subject to governmental regulation in its entire operation because of its enrollment of students who receive federal aid.

This Court can interdict this patent overreaching of regulatory authority by stating in this case what every court, save one, has found to be so obvious: the regulatory authority of the Department of Education is limited to those programs and activities which receive federal financial assistance under specific, federal grant statutes. It can do so, of course, without jeopardizing, in any way, Title IX's goal of insuring that tax dollars collected from all the citizens are not spent in a way which precludes some citizens from sharing in the benefits of those expenditures solely because of their sex.

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[24] 34 C.F.R. § 106.31 (b) (4).

[25] 34 C.F.R. §§ 106.21(c), 106.40.

CONCLUSION

The decision of the Second Circuit Court of Appeals should be reversed.

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